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No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Questions Presented

1. Whether Congress intended the AEDPA's limitations on second or successive habeas corpus petitions to apply to all claims and in every court, including competency for execution claims and applications for "original" Supreme Court habeas corpus writs.

2. Whether applying the AEDPA to prevent consideration of a claim of incompetency for execution, raised in a second or successive habeas corpus petition, constitutes a violation of the Suspension Clause.

3. Whether this Court has jurisdiction to entertain the State's petition for review in light of the express prohibition against certiorari under 28 U.S.C. §2244(b)(3)(E) and the absence of extraordinary circumstances warranting relief under the All Writs Act (28 U.S.C. §1651(a)).

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and[p]romote the proper and fair administration of justice." NACDL has more than 9,000 members nationwide -- along with 78 state and local affiliate organizations numbering 25,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*. *See, e.g., Trest v. Cain*, 66 U.S.L.W. 4023 (1997).[1]

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1 Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Statement of the Case

This case raises important questions relating to the power of the federal courts to entertain constitutional claims concerning the mental competence of death-sentenced state prisoners facing impending execution (*Ford v. Wainwright*, 477 U.S. 399 (1986)) where such claims, although timely asserted, may not properly be adjudicated in the prisoner's initial habeas petition (on grounds of prematurity) and would now appear to be explicitly precluded from consideration on a second or successive habeas petition under the terms of the newly-codified 28 U.S.C. §2244(b)(1) & (2) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, effective April 24, 1996.

Subsection (b)(1) of the new statute states categorically that any claim presented in a prior habeas application "shall be dismissed", irrespective of whether that claim received merits adjudication in the district court.[2] Subsection (b)(2) provides that new claims presented in a second application must be dismissed unless the prisoner demonstrates that his claim is based on a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable (subsection (b)(2)(A)) or that his claim is based on a colorable factual demonstration of innocence (subsection (b)(2)(B)). Accordingly, as the court of appeals noted, the new statute thus effectively whipsaws a habeas petitioner by precluding a federal court from entertaining a colorably meritorious execution-competence claim on either a first *or* a second federal petition. 118 F.3d at 630-31.

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2 As noted by the court of appeals, "[t]his sanction applies to a competency claim raised in a first petition even though that claim can never be adjudicated because it will always be premature." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630-31 (9th Cir. 1997).

Further complicating matters is the unintended retroactive impact of the AEDPA, enacted on April 24, 1996, on the adjudication of respondent's execution-competence claim. This Court determined last Term that the AEDPA's revisions to Chapter 153 of Title 28 of the United States Code apply only to habeas petitions filed on or after its effective date. *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997). However, the new statute's implications for cases like the one at bar, whose litigation effectively straddles the enactment of the new statute, is indeed problematic.

In this case, respondent filed his initial federal petition in March 1993 and the district court granted partial habeas relief, on unrelated grounds, in October 1994. *Martinez-Villareal v. Stewart*, 80 F.3d 1301, 1305 (9th Cir. 1996). Nevertheless, the district court found respondent's execution-competence claim to be premature and dismissed it without prejudice. *Id.* at 1307; 118 F.3d at 630 & n.1.[3] On appeal, the court of appeals reversed the district court's grant of partial habeas relief. 80 F.3d at 1307-09. It did so, however, with the express proviso that its "instruction to enter judgment denying the petition is not intended to affect any later litigation of [the execution-competence] question." 80 F.3d at 1309 n.1; 118 F.3d at 630.

Intervening events, however, unexpectedly changed the fundamental legal complexion of the case. The court of appeals' decision reversing the grant of relief -- except on the execution-competence claim -- was entered on April 4, 1996. Three weeks later, on April 24, 1996, the AEDPA was

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3 Indeed, the court of appeals found it ironic that it was the State that had urged the district court to find respondent's execution-competence claim not yet ripe for adjudication, suggesting that it await the resolution of his other legal claims and the issuance of an execution warrant. 118 F.3d at 630 n.1.

subsequently signed into law. The new Act's wholesale statutory revision of habeas corpus remodeled the landscape by which second and successive petitions were henceforth to be treated by the federal courts. *Compare* amended-§2244(b)(1) & (2)(mandatory dismissal for same-claim petitions with narrow exceptions only for new claims) *with McCleskey v. Zant*, 499 U.S. 467, 489 (1991)(permissive dismissal based upon "the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions"); *Felker v. Turpin*, 116 S.Ct. 2333, 2340 (1996).

Accordingly, in May 1997, when respondent sought to amend the district court's judgment and renew his execution-competence claim -- the same claim that was earlier dismissed without prejudice -- his motion was now denied as a result of the new successive writ provisions of the AEDPA. *Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997). The court of appeals, however, granted limited procedural relief. *Id.* at 629, 632-33. Holding that AEDPA's prohibition on successive petitions did not apply to a petition that raised only an execution-competence claim -- a claim that was timely asserted in respondent's original petition but dismissed without prejudice as premature -- the court of appeals transferred the petition to the district court, pursuant to 28 U.S.C. §2241(b), for plenary merits adjudication. *Id.* at 633-34.

Before this Court, and upon dubious jurisdictional grounds -- *see* Point III, *infra* -- the State seeks to overturn the court of appeals' carefully-crafted statutory analysis, in which it relied on the venerable rule that courts should construe statutes so as to avoid constitutional questions, by suggesting that this Court engage instead in a thorough-going re-examination of the Suspension Clause (U.S. Const., art. I, §9, cl. 2) and its implication for the wholesale vitality of the

statutory changes wrought in habeas jurisprudence by the AEDPA. (Pet. Br. Point II). The State's contentions in this regard are thoroughly addressed (and refuted) in the *amicus curiae* brief filed herein by the American Civil Liberties Union on behalf of respondent and will not be repeated here.

This brief addresses several additional issues that the State has given unnecessarily short shrift but which come closer to the core of the actual legal controversy presently before the Court. First, the new amendments to §2244 foreclose any adjudication of respondent's *Ford* claim even though it would have received merits review under prior law -- as explicitly intended by the very federal judges who had earlier entertained respondent's claims. That being the case, the new AEDPA has effectively worked an arbitrary (and retrospective) change in the law in violation of the due process clause. This statute dramatically changed prior law -- as well as upsetting the settled expectations of the very federal judges who had earlier entertained respondent's claims and anticipated their later renewal on the merits. Indeed, the unfairness of this unexpected change of law was underscored by this Court's subsequent determination that AEDPA's provisions were to be applied only prospectively. *Lindh v. Murphy*, 117 S.Ct. at 2063.

Second, respondent's *Ford* claim is no "successive" claim by any plausible construction of the controlling statutes, including §2244(b)(1) & (2). Indeed, this second application is respondent's first meaningful opportunity to put his *Ford* claim before the federal courts for plenary merits review. Whether construed under principles of, e.g., successive petitions (*Sanders v. United States*, 373 U.S. 1, 15-16 (1963); *McCleskey v. Zant, supra*) or exhausting the state remedies of mixed habeas petitions (*Rose v. Lundy*, 455 U.S. 509 (1982)), where there has been no prior judgment on the merits of a

timely-asserted habeas claim, and where the claim was explicitly dismissed without prejudice, a later renewal of the same claim does not constitute a successive petition.

Moreover, where respondent is not attacking his conviction or sentence *per se*, but only the procedures employed in evaluating his mental state pending execution of sentence, he is independently entitled to present his claims to the federal courts under the omnibus federal habeas statute (28 U.S.C. §2241(c)(3)). Under any and all of these jurisdictional (and constitutional) bases, the court of appeals correctly construed the new statute in a way that properly avoided serious constitutional conundra.

SUMMARY OF ARGUMENT

1. This Court has held that the habeas corpus amendments enacted as part of the AEDPA apply prospectively to cases filed after its enactment in April 1996. Respondent's execution-competence claim was raised in his first pre-AEDPA petition but was dismissed without prejudice as premature by both the district court and the court of appeals prior to the new statute's enactment. Enforcement of the successive writ provisions of the new statute would now mandate dismissal of respondent's renewed claim. In light of the "new legal consequences" and reliance interests of the parties -- as well as the federal judges who ruled on the first petition -- dismissal of respondent's execution-competence claim without plenary merits review would constitute the retrospective enforcement of a prospective statute to a case whose litigation straddled the time period in which the legislation was enacted. Constitutional and equitable principles uniquely applicable to habeas corpus fully justified the court of appeals' remand of respondent's *Ford* claim to the district court, notwithstanding amended-§2244, for

plenary merits review.

2. Respondent's *Ford* claim was properly remanded to the district court for merits review. The claim was not successive as there had been no prior adjudication on the merits when it was raised in respondent's first petition. Accordingly, the district court could entertain the renewed claim either under the traditional habeas corpus statute (28 U.S.C. §2241(c)(3))or under Rule 60(b)(6) of the federal civil rules.

3. This Court lacks jurisdiction to entertain the State's petition for review. Certiorari is precluded by statute in this case and the State has failed to make the requisite showing of extraordinary circumstances to warrant relief under the All Writs Act.

ARGUMENT

I

ENFORCEMENT OF AMENDED-§2244'S SAME-CLAIM PRECLUSION RULE AGAINST RESPONDENT'S *FORD* CLAIM WOULD VIOLATE DUE PROCESS BY, IN EFFECT, ENFORCING RETROACTIVELY A STATUTE THIS COURT HAS DETERMINED APPLIES ONLY PROSPECTIVELY

In *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), this Court determined that, absent a clear statement from Congress, a new law should not be applied to penalize past conduct if it would "attach[] new legal consequences to events completed before its enactment." *Id.* at 270. Courts have developed a longstanding presumption against retroactivity reflective of the notion that "[r]etroactive legislation presents

problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors v. Romein*, 503 U.S. 181, 191 (1992).

Landgraf provides a wide range of illustrative ways in which statutory provisions may create (or extinguish) "new legal consequences" by their retrospective application. Among the kinds of statutory provisions that have "retroactive effects" are those that (1) "affect[] substantive rights", 511 U.S. at 278, (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, or (3) "change the legal consequence of acts completed before [the new law's] effective date" *id.* at 269 n.23.

In the present case, the "new legal consequences" of the statute's enactment amounts to the outright extinction of respondent's right to secure plenary review of his *Ford* claim. Notwithstanding the express reservation of his right asserted in his first petition -- a reservation concurred in by both the district court and the court of appeals -- the new statute expressly precludes respondent from renewing his "same claim" in a later petition, precisely the vice *Landgraf* cautioned against, 511 U.S. at 270 ("retroactivity is a matter on which ... considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance"); *id.* at 282 n.35 ("concerns of unfair surprise and upsetting expectations"); *id.* at 265 n.18 ("deprive citizens of legitimate expectations and upset settled transactions").

As the Court recently reaffirmed in an *ex post facto* case, the constitutional limitations on civil and criminal retroactive legislation are necessary in order to "place[] limits on the sovereign's ability to use its lawmaking power to modify

bargains it has made with its subjects". *Lynce v. Mathis*, 117 S.Ct. 891, 895 (1997).

Part of the analysis of whether retroactive application of a statute is arbitrary and irrational is whether it imposes an oppressive and harsh burden. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938).. In this case, where the "new legal consequences" of the amended statute have extinguished respondent's substantive and procedural rights that were expressly reserved for him by the federal courts, his right to due process has been violated as well. As the writ of habeas corpus has evolved into a mechanism that guarantees application of basic constitutional doctrines of fairness, so its flexibility as an equitable remedy allows courts to shape relief to the circumstances -- and equities -- of each case. *Lonchar v. Thomas*, 116 S.Ct. 1293, 1298 (1996); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Faced with these equitable -- and constitutional -- considerations, the court of appeals properly balanced the equities in refusing to enforce the harsh and inflexible provisions of §2244 against respondent. In so doing, it interpreted the statute in such a way as to avoid serious constitutional problems in the enforcement of a statute intended to be enforced only prospectively.

II

NOTWITHSTANDING AMENDED-§2244, RESPONDENT'S *FORD* CLAIM MAY BE HEARD BY THE FEDERAL COURTS WHERE IT WAS RAISED IN HIS INITIAL HABEAS PETITION AND WAS NEVER ADJUDICATED ON THE MERITS; ALTERNATIVELY,

RESPONDENT MAY INVOKE §2241(C)(3) WHERE HE IS ATTACKING THE ADMINISTRATION OF HIS SENTENCE, NOT THE JUDGMENT OF CONVICTION OR SENTENCE

Putting aside the constitutional implications of retroactively enforcing amended-§2244 against a prisoner under circumstances in which both the federal district court and the court of appeals explicitly extended him the right to renew his *Ford* claim at such future time as it became ripe for adjudication, it is axiomatic that the court of appeals' solution -- a remand to the district court for plenary merits review -- was eminently correct. 118 F.3d at 632-34.

A. The *Ford* Claim Was Not Successive Where There Had Been No Prior Judgment On The Merits

Section 2244 ordinarily does not apply to second or successive petitions where the first petition was dismissed without prejudice or there was no merits adjudication of the operative claim sought to be litigated anew. *See In Re Turner*, 101 F.3d 1323 (9th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996)("because application of the gatekeeping provisions [of §2244] to deny a resubmitted petition in cases such as this would effectively preclude any habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions"); *see especially Burris v. Parke*, 95 F.3d 465, 468-69 (7th Cir. 1996)(*en banc*)(habeas petitioner allowed to proceed under pre-AEDPA provisions where litigant had no prior notice of Act's stringent successor provisions).

Turner and *Camarano* are founded on the total-exhaustion principles of *Rose v. Lundy* but the same rationale applies with equal force to respondent's *Ford* claim. Just as

mixed petitions containing unexhausted claims must be dismissed, so, too, execution-competence claims raised in first petitions will always be dismissible as premature. Accordingly, to relegate competence claims to successive petitions under the new statute is to ensure that they will never receive plenary adjudication on the merits in the federal courts. *See, e.g.*, Rule 9(b) of the *Rules Governing §2254 Cases* ("prior determination ... on the merits"); *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990)(*en banc*)("the District Court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition"); *Rose v. Lundy*, 455 U.S. at 537-38 (Brennan, J., concurring and dissenting); *see also* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice And Procedure* §§28.3b at 918-19 & nn.36-38, 28.4d at 935-37 (2d ed. 1994) (and cases collected therein).[4]

Thus, where an execution competence claim has been raised in an initial federal petition, and dismissed as premature, the federal courts must be permitted to entertain the merits of the claim once it achieves "ripeness" without running afoul of the successive petition rule. All habeas litigants remain entitled to "one bite of the apple" of plenary review. Where he cannot receive merits adjudication when his claim is initially presented, through no fault of his own, he is nevertheless entitled to it once it becomes ripe for adjudication. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)(state cannot terminate a

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4 Indeed, as the courtof appeals itself noted (118 F.3d at 634 n.7), the *sui generis* nature of execution-competence claims, and the exceptional procedural posture in which they usually arise, leaves open the question whether they even fit within the conventional rubric of the phrase "second or successive habeas corpus applications", *citing Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995)(*Ford* claims in the context of abuse of the writ or successive petitions); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994)(accord).

party's claim simply because a hearing was not held within specific time, particularly where he has no means of ensuring deadline is met; party is entitled to an "opportunity to present his case and have its merits fairly judged").

B. The *Ford* Claim May Be Renewed In The District Court Under F.R.C.P. 60 (b)(6) Where Timely Asserted First Petition Claim Is Now Ripe For Adjudication

The court of appeals was well within its authority in remanding respondent's *Ford* claim to the district court for plenary review, particularly where the claim had already been timely asserted in respondent's first habeas petition and it was dismissed without prejudice on prematurity grounds. The district court initially declined to entertain respondent's motion to reopen the first habeas proceeding, believing itself divested of jurisdiction by the AEDPA . 118 F.3d at 630. Under Rule 60(b)(6), however, the district court had the power to reopen the proceedings, notwithstanding AEDPA, and the court of appeals correctly sent the matter back to the district court for plenary merits review.

Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when 'appropriate to accomplish justice'". *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977)(*quoting Klapprott v. United States*, 335 U.S. 601, 615 (1949)(plurality opinion of Black, J.)). It constitutes a "grand reservoir of equitable power to do justice in a particular case". *Radack v. Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); *Matarese v. LeFevre*. 801 F.2d 98, 106-07 (2d Cir. 1986). It is "properly invoked where there are extraordinary circumstances" (*Ackermann v. United States*, 340 U.S. 193, 199 (1950)) and "should be liberally construed when substantial justice will thus be served".

United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977). The Second Circuit has ratified the use of Rule 60(b)(6) motions in the context of habeas proceedings where, *inter alia*, there has been post-judgment change in the law. *Matarese*, 801 F.2d at 106 (*citing Sanders v. United States*, 373 U.S. at 8).

This Court has determined that "to reopen a judgment ... [pursuant to Rule 60(b)(6)], a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay"; extraordinary circumstances are present when a party was prevented from earlier compliance by "incarceration, ill health, [or] other factors beyond his reasonable control". *Pioneer Inves. Serv. Co. v.. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 394 (1993); *Ritter v. Smith*, 811 F.2d 1398, 1401-03 (11th Cir. 1987); *High v. Zant*, 916 F.2d 1507, 1509-10 (11th Cir. 1990).

Here, of course, the "changed circumstance" was entirely outside respondent's control -- the State of Arizona set a formal execution date which perforce made his execution-competence claim immediately justiciable. Under the changed factual circumstances, then, respondent's *Ford* claim is finally ripe for adjudication and should be reconsidered on the merits by the district court before which it was originally asserted. Rule 60(b)(6) is the appropriate jurisdictional vehicle by which the district court may proceed.

C. The Traditional Habeas Remedy Of §2241(c)(3) Remains Available Where A State Prisoner Attacks The Imposition Of His Sentence, Not The Judgment Of Conviction Or Sentence

This Court has recognized that the range of cognizable claims raised by state prisoners in habeas corpus proceedings is

extremely broad. These claims address not only attacks on judgments of conviction and sentences imposed by state courts, pursuant to §2254, but also collateral attacks by state and federal prisoners alleging that they are being held "in custody in violation of the Constitution or law or treaties of the United States". 28 U.S.C. §2241(c)(3). *McCleskey v. Zant*, 499 U.S. at 477-78. Among these cognizable habeas claims are those attacking the method of execution -- *Gomez v. U.S. Dist. Ct.*, 503 U.S. 653 (1992)(lethal gas); *Poyner v. Murray*, 508 U.S. 931, 932-33 (1993)(Souter, J., opinion respecting denial of certiorari)(electrocution); *Campbell v. Wood*, 511 U.S. 1118, 1119-20 (1994)(Blackmun, J., dissenting from denial of stay and certiorari)(hanging) -- as well as attacks on procedures for fairly assessing the mental state of the condemned to determine his execution-competence. *Ford v. Wainwright, supra. See also Preiser v. Rodriguez*, 411 U.S. 475 (1973)(habeas corpus is a "concurrent federal remedy" along with 42 U.S.C. §1983 in prison conditions cases).

While Congress has amended and fine-tuned the federal courts' power to entertain and issue the writ to state and federal prisoners attacking their convictions under 28 U.S.C. §§2254 & 2255, it has nevertheless left unamended -- and unimpeded -- the general power of the federal courts to grant the writ of habeas corpus under §2241 -- the statute that is the direct descendent of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which greatly expanded the scope of the writ. *Felker v. Turpin*, 116 S.Ct. at 2338-39; *Triestman v. United States*, 124 F.3d 361, 373-80 (2d Cir. 1997)(Calabresi, J.); *In re Dorsainvil*, 119 F.3d 245, 248-49 (3d Cir. 1997); *Mojica v. Reno*, 970 F.Supp. 130, 157-63 (E.D.N.Y. 1997)(Weinstein, J.)(AEDPA provisions amending §§2254 & 2255 do not constitute a repeal of §2241; "[r]epeals by implication are not favored").

In *Triestman*, the Second Circuit held that a federal prisoner raising a colorable *Bailey* claim could bring his habeas petition via the traditional remedy of §2241 where he was otherwise precluded under the AEDPA from filing a successive petition for post-conviction relief. Finding that the recent amendments to §2255 rendered it inadequate and ineffective in that case to test the legality of Triestman's detention, the court determined that the alternative remedy under §2241 remained unimpaired by Congress' handiwork -- a conclusion this Court earlier underscored in *Felker*.

Of particular relevance here, the Second Circuit also determined that filing a habeas claim under §2241 would not constitute a successive petition where Triestman's earlier petitions all had been filed under §2255. *Triestman*, 124 F.3d at 373 n.17. *See also Chambers v. United States*, 106 F.3d 472, 475 (2d Cir. 1997)("Because Sections 2255 and 2241 address different types of claims, filing a Section 2255 motion after filing a Section 2241 motion does not trigger the gatekeeping provisions of Section 2244").

So, too, it is here. Respondent's *Ford* claim goes not to the validity of his conviction and sentence but addresses only the collateral manner of the administration of his execution. Respondent is thus entitled to litigate the validity of this independent federal claim under §2241, notwithstanding that the gatekeeping provisions of §2244 may preclude him from seeking federal relief under §2254. Clearly, in the absence of Congressional repeal of §2241, that two hundred year old statute retains its vitality by which to assert federal jurisdiction over habeas claims latterly rendered unavailable under the AEDPA.

III

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE STATE'S CLAIMS EITHER BY CERTIORARI OR EXTRAORDINARY WRIT

The State candidly concedes (Pet. Br. Point III), as it must, that it is precluded from seeking certiorari in this Court by virtue of §2244(b)(3)(E), which provides that "[t]he grant or denial" of leave to file a successive petition "shall not be the subject of a petition for rehearing or for a writ of certiorari". As this Court noted in *Felker*, "[t]he Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." 116 S.Ct. at 2339. Indeed, the very language of the statute ("grant or denial") indicates Congress' unmistakable intention to exclude prosecutors, as well as prisoners, from appealing court of appeals' certification decisions.

In *Felker*, this Court noted that while it was precluded from entertaining certiorari petitions, it nonetheless retained the authority to hear habeas petitions filed as original matters in the Court. 116 S.Ct. at 2338-39. This, of course, is of no avail to the State as it is only the prisoner -- and not the prosecutor -- who may seek an original writ of habeas corpus from the Supreme Court, and even then only under extraordinary circumstances. *See, e.g.*, Robert L. Stern *et al.*, *Supreme Court Practice* §11.3 at 501-04 (7th ed. 1993); 2 Liebman & Hertz, Ch. 40 (and authorities collected therein).

That leaves review by means of extraordinary writ under the All Writs Act (28 U.S.C. §1651(a)) in the nature of mandamus, prohibition, certiorari or habeas corpus. With certiorari and habeas corpus unavailing, the State is left with

mandamus or prohibition -- neither of which provides a proper jurisdictional basis upon which to invoke this Court's appellate jurisdiction.

This Court has reiterated that the writs "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes" in which "appeal is a clearly inadequate remedy". *Ex Parte Fahy*, 332 U.S. 258, 259, 260 (1947). "The power to issue [the writ] is discretionary and it is sparingly exercised". *Parr v. United States*, 351 U.S. 513, 520 (1956). "Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n.6 (1967); *Will v. Calvert Fire ins. Co.*, 437 U.S. 655, 665-66 n.7 (1978).

Here, of course, the State attempts an end-run around this jurisdictional barrier. It asserts that since the lower court neither "granted" nor "denied" respondent's certification application -- it simply remanded the case to the district court *simpliciter* -- §2244(b)(3)(E) is somehow inapplicable and ordinary certiorari should apply. In addition to exalting form over substance, the State actually seeks precisely the sort of disfavored interlocutory review of a patently nonappealable order that this Court has repeatedly held to be beyond the authority of the extraordinary writs. *See, e.g., Bankers Life Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roberts v. U.S. District Court*, 339 U.S. 844, 845 (1950).

In this case, the court of appeals has remanded the proceedings to the district court for plenary merits review of respondent's *Ford* claim. Either party aggrieved by the district court's ultimate merits determination will at that time have the customary opportunity for plenary appellate review (28 U.S.C.

§§1291 & 2253) as well as the right thereupon to seek certiorari review in this Court (28 U.S.C. §1254(1)). Accordingly, the issuance of an extraordinary writ at this interlocutory stage of the litigation is wholly unwarranted where there is little likelihood that this Court will ultimately be deprived of its customary appellate jurisdiction over final orders at the conclusion of merits adjudication at *nisi prius*. Certiorari should therefore be dismissed in this case for want of jurisdiction.

Conclusion

The judgment of the court of appeals should be affirmed; alternatively, certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

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